Supreme Court, U.S.
FILED
DEC 20 2006
OFFICE OF THE CLERK

No. 06-951

In the Supreme Court of the United States

NADA RAAD

PETITIONER

VS.

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NADA RAAD ,PRO SE
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No. _____

_____

IN THE
SUPREME COURT OF THE UNITED
STATES

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VS.

FAIRBANKS NORTH STAR BOROUGH
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QUESTIONS PRESENTED FOR REVIEW

1-Whether the court below erred in determining—in conflict with this Court and multiple courts of appeals and should be settled by this Court—The US Court of Appeal for the Ninth Circuit entered a decision to award an attorney fees against petitioner in Title VII case. Petitioner established prima facia case and went to trial where petitioner represented legitimate jury issue.

2- Whether the court below erred in determining—in conflict with this Court and multiple courts of appeals and should be settled by this Court— who will decide on the pretext in discrimination cases if the jury were not explicitly directed to look at pretext which is a major role in determining this discrimination and retaliation case.

3- Whether the court below erred in determining—in conflict with this Court and multiple courts of appeals and should be settled by this Court- who are the hiring authorities –Do we consider any respondent's employees who are involved in hiring and suspending applicant as hiring authorities?

List of Parties

[X]All parties appear in the caption of the case on the cover page

The ninth Circuit Court of Appeal cited Robert Sparks in another case number but Interested Party Nada Raad (Appellant) in its caption of the memorandum. (uncertain if the court consider him a party)

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Fairbanks North Star Borough School District
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Parent Corporations and listing any publicly held company that owns 10% or more of the corporation's stock is not applicable in this case

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United Sates Court of Appeals for the Ninth Circuit appears at Appendix A to the petition and is unpublished

JURISDICTION

The date on which the United State Court of Appeals for the Nine Circuit decided my case was August 24, 2006 and a copy of the opinion appears at Appendix A. A timely petition for rehearing and rehearing en banc was denied by the United States Court of appeals on the following Date September 28, 2006 and a copy of the order appears at Appendix B. The Jurisdiction of this Court is invoked under 28 U.S. C. § 1254(1)

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are:
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.
28 U.S. C. § 1254(1)
9th circuit Rule 10-3.1 (f)

447 U.S. 920 (1980)
432 U.S. 905

STATEMENT OF THE CASE

Timeliness of Appeal

On August 27, 1993, Ms. Raad contacted the Alaska Human Rights Commission and submitted her intake questionnaire regarding the reprisal, national origin and religious discrimination by the School District in failing to hire her during 1991-1993. In 1997, the Alaska Human Rights Commission dismissed the case. Petitioner followed up with EEOC and received a letter of right to sue. This case was filed in Federal District Court in Fairbanks, Alaska on October 1997. In 2003, Ninth Circuit court of Appeal reversed the summary judgment where Prima facie case had been established and went back to trial. The trial was conducted in 2004. *See* Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185-1198 (9th cir. 2003)

Respondent prevailed upon jury special verdict. Petitioner had to represent herself after the trial and appealed as pro se to the Ninth Circuit court of Appeal. The majority of Ninth Circuit Court of appeal dismissed in part and affirmed in part in an unpublished memorandum while minority dissenting in part on August 24, 2006 (Appendix A). Appellant filed a petition for a rehearing/enbanc. The rehearing/enbanc was denied on September 28, 2006 (Appendix B).

History

Petitioner came to Alāska in 1989. Petitioner enrolled in the University of Alaska Fairbanks teaching certification program during the fall of 1989, and became certified to teach public school in Alaska since 1991. Petitioner applied for a substitute teaching position in 1990 and teaching positions in 1991 with the Respondent. Teachers requested from Petitioner to substitute for her. Petitioner received many distinguished employment recommendations for her teaching abilities. Petitioner was not hired for a full time teacher in 1991 and 1992 school year. On September 23, 1992, Petitioner met with respondent's EEO officer, and complained that she believed that respondent had failed to hire her as a teacher during the 1991-1992 and 1992-1993 school years, because of discrimination against her based on her national origin Lebanese and religion Muslim (Moslem) . *See* Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185-1198 (9th cir. 2003).

After petitioner was rejected for Lathrop High School, she went to the respondent administrative office and met with Respondent's EEO. At their meeting, the EEO told petitioner that respondent did not want to hire her, because of her accent. Petitioner was trying to see Respondent's superintendent to resolve the hiring issue but instead petitioner was falsely accused of threatening to blow up the administrative building. Upon this accusation respondent pressed against Petition charges with District attorney. The District attorney dismissed the charges because of the lack of substantial evidence. After the District

Court dismissed the case, Respondent suspended petitioner for 1992-1993 school year Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185, 1188-1198 (9th cir. 2003).

Argument

This is a title VII of the Civil Rights Act of 1964 Civil Rights act, 42 U.S.C. 2000e et seq,. The District Court [Docket 353] and the Ninth Circuit in Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185-1198 (9th cir. 2003) has held that Plaintiff established a prima facie case of discrimination that she raised for Title VII 2000e et seq. See (Appendix A).

The ninth circuit court of Appeal erred in dismissing the case because petitioner did not produce the trial transcript. The Ninth circuit ordered petitioner to either produce the trial transcript or filed a certification upon 9th circuit order as in rule 10-3.1 (f). (Appendix C). Rule 10-3.1(f). stated that "If appellee notifies appellant that additional portions of the transcript are required pursuant to 9th Circuit R 10-3.1(b), appellant shall make arrangements with the court to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not" Petitioner filed a certification in compliance with this order. The transcript is not necessary if the rule gave an outlet not to produce it in order to argue the case in an appeal (Ninth Circuit Rule 10-3.1(f)).

U.S. Supreme Court and Appeal Courts used pretext as a major element in discrimination and retaliation cases. The ninth

circuit of Appeal stated in the memorandum that "it is not normally appropriate to introduce the McDonnell Douglas burden-shifting framework to the jury." (Appendix A). In most employment discrimination cases direct evidence of discriminatory motive is unavailable or difficult to obtain. The U.S. Supreme Court had set forth an indirect method of proof, which relies on presumptions and shifting burdens of production Haroldsen Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973), . McDonnell Douglas v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1980). Prima facie case had been established in this case as the Ninth Circuit court of Appeal confirmed (Appendix B) Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185 (9th cir. 2003), Petitioner raised a presumption that the employer engaged in intentional discrimination. Burdine, supra, 411 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed 2d at 207. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the complainant's non-selection/ termination/adverse action. Burdine supra, 450 U.S. at 255 & n.10, 101 S.Ct. at 1094-95 & n. 10, 67 L.Ed 2d 207. If the employer carries its burden, the presumption of discrimination goes away and the Petitioner must then demonstrate that the employer's alleged reason for the non-selection/termination/adverse action is a pretext for another motive, which is discriminatory. Burdine, 450 U.S. at 255 & n.10, 101 S.Ct. at 1094-95 & n. 10, 67 L.Ed. 207 & n.10; Wallis

v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); Yartzoff v. Thomas, 809 F.2d 1371, at 1375 (9th Cir. 1987). An appellant can produce "specific, substantial, evidence of pretext" in response to defendant's articulation of its nondiscriminatory reason. Plaintiff's burden of production regarding evidence of pretext is not onerous. Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995), cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed. 2d 209 (1996). To establish pretext, petitioner must show that the alleged reason was false, and that the true reason was discrimination St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515, 113 S.Ct.2742 at 2752, 125 L.Ed.2d 407 (1993). "Disparate treatment case can prove pretext either indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or other wise not believable or directly showing that unlawful discrimination more likely motivated the employer. On disparate treatment claim, all of the evidence of pretext, whether direct or indirect is to be considered cumulatively; Civil Rights ~~Act of 1964~~ 701 at seq as amended 42 U.S.C.A. 2000e seq." Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185, 1187 (9th cir. 2003). Petitioner can demonstrate pretext "either directly by persuading that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employers' proffered explanation is unworthy of credence." Id. At 256. Burdine, 450 U.S. at 255-56. Petitioner would be able to show pretext where other applicants were treated more favorable. Petitioner must be offered a fair

opportunity to demonstrate pretext McDonnell Douglas v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). In the entire above cases pretext is the key to proof discrimination and retaliation. Is it the District Court responsibility to look at the evidence of pretext if pretext is not explicitly introduced to the Jury ?

There is a question of who are the actual decision makers behind hiring, suspending Petitioner and sending memo to all administrative school buildings not to hire Petitioner with any time limits. It will be difficult to proof pretext if the court limited its decision to the reasons given only by the committee members who interviewed Petitioner for the job in this case. It is an obstacle to proof pretext if the court disregarded the inconsistent reasons given by the personnel director and EEO and other respondent's employees for not hiring Appellant in this case. U.S. Supreme Court referred to hiring authorities or decision maker in suspension as the responsible respondent's employees; Reeve v. Sanderson Plumbing Products. Inc. 99-536) 53- U.S. 133 (2000) 197 F. 3d 688; McDonnell Douglas v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). These employees were part of decision making of hiring and suspending Petitioner. The district court did note that Raad presented one "legitimate jury issue" namely, "that she was disciplined inordinately because of her race and or religion after the incident in the superintendent's office." (Appendix A). The district court needed to weigh petitioner's additional evidence of discrimination against

other circumstances surrounding Petitioner suspension. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. See, *e.g.*, Wright v. West, 505 U.S. 277, 296. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Cf. Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577. " There is a question if the hiring authorities are any of the respondent employer's who play part in any decision regarding hiring , rejecting suspending petitioner. There is a question if false reasons given to petitioner in rejecting her for employment by any of the respondent employer's who play part in any decision regarding hiring then Petitioner can established pretext.

As with respect to the attorney fees, the Ninth Circuit in Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185-1198 (9th cir. 2003) has held that Plaintiff established a prima facie case of discrimination that she raised and the case should go back to trail. The U.S. Supreme Court's ruling that Civil Rights plaintiff's do not need any direct evidence of discrimination and can proceed to trial if they establish a prima facie case of discrimination and present evidence showing that the employer's excuse is a pretext. Reeve v. Sanderson Plumbing Products. Inc. 99-536) 53-U.S. 133 (2000) 197 F. 3d 688. The District Court failed to show if plaintiff's claims lacked

merit, had no foundation or not reasonable, frivolous or brought in a bad faith.
The District Court stated "In Warren v. City of Carlsbad, 58 F.3.d (9th Cir. 1995), the Court of appeals reversed on substantive issues and with respect to attorney fee observed" (District Court Docket 385 at 4-5): Warren made a prima facie showing of Title VII disparate treatment under McDonnell Douglas. He also raised additional facts that may point to a discriminatory motive for his rejection. Therefore, the district court's conclusion that warren's case was clearly frivolous is incorrect. "Suggesting that a plaintiff who makes out a prima facie case under Title VII cannot be found to have presented a claim that is "Frivolous, unreasonable or groundless Id. At 445. In so stating the Ninth Circuit has reference to the case of Marguart v. Lodge 837, Int'l Ass'n of Machinists, 26 F.3d 842, 853 (8th Circuit 1994). The U.S. Supreme Court held that "In a federal civil rights case or discrimination case, a prevailing defendant *may* not be awarded attorney fees unless the plaintiff's federal claims are "frivolous, unreasonable or without foundation." Christiansburq Garment *Co.v.* EEOC, 434 U,S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (l978). The Ninth Circuit acknowledged that the district court did note that Petitioner presented one " legitimate jury issue" namely , " that she was disciplined inordinately because of her race and or religion after the incident in the superintendent's office." (Appendix A). This indicated that this case does not lack a reasonable or arguable basis in law of fact which in return make it not frivolous or lack of foundation. The U.S.

Supreme Court stated that "A claim is frivolous if it lacks a reasonable or arguable basis in law or fact. Neitzke v. Williams, 490 U.S. 319, 325,109 S.Ct. 1827, 1831, 104 L.Ed.2d 338, 347 (1989)". This situation is applicable in this case.

A prevailing Civil Rights plaintiff is entitled to an award of attorney's fees Christiansburg, 434 U.S. at 416- 17, 54 L.Ed.2d at 417. Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9lh Cir. 1994). However, a prevailing Defendant should not routinely be awarded attorney's fees simply because it has succeeded, but rather only where the action is found to "unreasonable, frivolous, meritless, or vexatious." Vernon, 274 F.3d at 1402 (quoting Roberts v. Spauldinq, 783 F.2d 867, 874(9th Cir.) denied 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 352 (1986); Christiansberg, 434 U.S. at 421, 98 S.Ct. at 700, 54 L.Ed.2d at 657. The mere fact that a defendant prevails does not automatically support an award of attorney's fees. Christiansberg, 434 U.S. at 421, 98 S.Ct. at 700, 54 L.Ed.2d at 657; Vernon, 274 F.3d at 1402. See Raad v. Fairbanks North Star Borough School District, 323 F. 3d 1185, 1195 (9th cir. 2003).

The District Court did not find that any of the discoveries sought by Plaintiff was vexatious, frivolous or sought in bad faith. (District court docket 269). "The general rule is that a prevailing Civil Rights plaintiff is entitled to an award of attorney's fees to encourage private actions to enforce the civil rights laws. Christiansburq Garment Co. v. EEOC, 434 U.S. 412, 416-17, 98 S.Ct. 694, 54 L.Ed.2d 648, 653 (1978). The Supreme Court ruled in

Christiansburg that Defendants are only entitled to fee awards in Title VII cases where a *"claim* was frivolous, unreasonable or groundless..." Christiansburg, 434 U.S. at 422, 54 L.Ed.2d at 657." Frivolous, unreasonable or groundless contradicted establishing prima facia case and legitimate jury issue as in this case (Appendix A).

The U.S. Supreme Court, in its discussion of prior decisions that the Court was adopting as authority for its decision in Christiansburg, clearly stated that "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case,.." The Court further noted that : "In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." The district court found that the Commission's action in bringing suit was not unreasonable or meritless; therefore, an award of attorneys' fees to the defendant was unjustified". Christiansburg, 434 U.S. at 421-22, 54 L.Ed.2d at 657. Furthermore, the U.S. Supreme Court's recent ruling that Civil Rights plaintiff's do not need any direct evidence of discrimination and can proceed to trial if they establish a prima facie case of discrimination and present evidence showing that the employer's excuse is a pretext. See Reeves v.

Sanderson Plumbing Products. Inc., 4 U.S (99-536) 530 U.S. 133 (2000) 197 F. 3d 688 Petitioner met these conditions.

In the dissenting in part from the $150, 000 fees award against Petitioner from the Ninth Circuit memorandum: "I respectfully dissent from the portion of the memorandum disposition approving the $150, 000 fees award against the plaintiff, Nada Raad... I would reverse the fee award outright as without justification Absent that disposition, I would remand to the district court for an explanation both as to the reason for the award and so the amount, I therefore respectfully dissent"(Appendix A).

The district court did not provide an adequate explanation for why the fee should be awarded and on what basis was calculated. In Christianburg Garment Co. v. EEOC 434 U.S 412, 421-22 (1978) a fee award without an adequate justification should be denied. The district Court at three occasions gave contradicting explanation that cannot be reconciled. The district court awarded attorney fees against petitioner when stated that the case is entirely frivolous then stated that there was "no rational basis for plaintiff allegation of discrimination and that the plaintiff claims were frivolous and totally lacking any factual foundation" (Appendix A). In a different order, the district court did note that Raad presented one "legitimate jury issue" namely, "that she was disciplined inordinately because of her race and or religion after the incident in the superintendent's office." (Appendix A). The majority acknowledged and conceded that at least part of the case of allegations concerning

discriminatory discipline was not frivolous (Appendix A). In the memorandum the majority and minority in the of Ninth Circuit Court of appeal agreed that prima facia case had been established when the summary judgment was reserved, genuine issues of facts exited and remanded the case to trial (Appendix A) Raad v. Fairbanks N. Star Borough School District , 323 F3d. 1185 -1198 (9th Circuit 2003). Under these circumstances fee award for respondent is improper Warren v. City of Carlsbad, 58 F. 3d 439, 444 (9th Cir. 1995).; Mitchell v. Office of L.A. County, 805 F. 2d 844, 847 (9th Cir. 1986) ; Petitioner also received right-to sue letter from the EEOC, thus indication that there was " an adequate basis in law and facts" to pursue the claim and indicating that the case was not without merit (Appendix A) ; Jensen v. Stangel, 762 F. 2d 815, 818 (9th Cir 1985). The ninth Circuit reversed the summary judgment Raad v. Fairbanks N. Star Borough School District , 323 F3d. 1185 (9th Circuit 2003). The district court did not give an explanation for any unusual development at trial referring to AFSMCE v. County of Nassau, 96 F. 3d 644 (2d Cir 1996) "The district court however, points to no such unusual circumstance here, and I am aware of none.....and there was no explanation by the district court that takes account of the prior reversal of summary judgment in this case, I would reverse the fee award" (Appendix A); The US Supreme Court referred to stringent standards apply to fee awards against plaintiffs in civil rights cases. The district court should award a prevailing defendant attorney's fees only if the plaintiff action was frivolous,

unreasonable or without foundation and none of these applied that petitioner is aware of, See Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). United States Steel Corp. v. United States, 519 F.2d 359, 362 (CA3) Carrion v. Yeshiva University, 535 F.2d 722 (Cir Two).

The District Court did not give any adequate explanation why the fee award is justified and how was calculated.
"A fee award without adequate justification cannot stand" (Appendix A) See Tutor-Saliba Corp. v. City of Hailey, 452 F. 3d 1055, 1065 (9th Cir. 2006); Benton v. Or. Student Assitance Comm'n , 421 F. 3d 901, 904 (9th Cir. 2005); Cummings v. Connell, 402, F. 3d 936, 947 (9th Cir. 2005).

The District Court denied respondent attorney fees after summary judgment (District Court Docket 385) referring to Warren v. City of Carlsbad, 58 F. 3d 439, 444 (9th Cir. 1995) and Marguart v. Lodge 837, Int'l Ass'n of Machinists, 26 F.3d 842, 853 (8th Circuit 1994). The Ninth Circuit Court of Appeal reverse the summary judgment in 2003 and the case went to trail at beginning of 2004. After the trial Respondent claimed that the legal cost was $ 887,000 but asked only for $180,000 and was awarded $150,000.

"The majority suggests that by awarding an amount much lower that the total costs incurred by defendants and a bit lower than the amount actually requested, the district court was adjusting for the nonfrivolous portions of Raad's case. There is absolutely no basis for this conclusion. The fee orders refer to overall, not partial, frivolousness and bad faith ....." (Appendix A). The District court awarded

attorney fees against plaintiff not because the case was partially frivolous but entirely frivolous and totally lacking any factual foundation. The district Court contradicted itself where it stated first the case is frivolous and lacked factual foundation and then stated that Raad presented one "legitimate jury issue" namely, "that she was disciplined inordinately because of her race and or religion after the incident in the superintendent's office. The District court failed to give any explanation why the case is frivolous and had no foundation (Appendix A). Attorney fees awarded against Petitioner should be denied. U.S. Supreme court established stringent standards to award fees against plaintiffs in civil right cases where only if the action was frivolous, unreasonable or without foundation. The fee referred by the District Court in this case to overall not partial. The majority of the Ninth Circuit Panel adjusted the fees to partial frivolous to justify the District Court decision in awarding attorney fees against Petitioner. There is no basis for such conclusion that contradicted the stringent standard of this court. Petitioner established prima facie, legitimate jury issue to go to trial. Petitioner is asking this Court to remand this case to the District Court and look at the pretext and reverse and vacate awarding attorney fees against Petitioner for application of the correct standard.

REASONS FOR GRANTING THE PETITION

This case is important for public since U.S. Supreme Court set stringent application of not awarding attorney fees against appellant in Title VII cases. The memorandum of the Ninth Circuit Court of appeals is in a conflict with interpretations of the U.S. Supreme precedents adopted by other courts of appeals, 447 U.S. 920 (1980). Certiorari should be granted to settle the standard of not awarding attorney fees against petitioner in Title VII cases should be applied.

The Majority of the Ninth Circuit Court of Appeal deviated from the stringent standard set by the U.S. Supreme Court in not awarding Attorney fees against Petitioner. Petitioner established prima facia case and went to trial where petitioner represented legitimate jury issue. This case is not frivolous and had foundation. The District Court gave neither gave explanation for awarding attorney fees against plaintiff nor explanation to the amount. It is important for the public that the Supreme Court resolves the conflict of interpreting the stringent standards for awarding such fees.

It is a question of federal law 432 U.S. 905 regarding who will decide on the pretext if it is not explicitly understood or applied by the Jury and who are the respondent's employees to be accounted as part of the decision of not hiring, suspending a plaintiff in title VII cases.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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Date: December 20, 2006

Appendix A

Not for publication

Memorandum

Before KOZINSKI, BERZON and TALLMAN, Circuit Judges

NOT FOR PUBLICTAION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

FILED
AUG 24 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 04-35447

D.C. No. CV-97-00068-F-RRB

NADA RAAD,
Plaintiff-Appellant,
v.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee

No. 04-35624
D.C. No. CV-97-00068-F-RRB

NADA RAAD,
Plaintiff-Appellant,
v.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee

No. 04-35990
D.C. No. CV-97-00068-F-RRB

NADA RAAD,
Plaintiff-Appellant,
v.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee
ROBERT A. SPARKS,
Real-party-in interest-appellant.

MEMORANDUM*

***This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.**

page 2

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted July 24, 2006
Anchorage, Alaska

Before: **KOZINSKI, BERZON and TALLMAN**, Circuit Judges.

1. Because Raad failed to comply with Federal Rule of Appellate Procedure 10(b)(2) by refusing to provide any part of the trial transcript, we cannot evaluate her sufficiency of evidence claim, and thus dismiss it. See Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991) (per curiam).

2. Raad contends that the district court erred in not instructing the jury on the McDonnell Douglas burden-shifting framework, but "it is not normally appropriate to introduce the McDonnell Douglas burden-shifting framework to the

jury. At that stage, the framework `unnecessarily evades the ultimate question of discrimination vel non.'" Costa v. Desert Palace, Inc., 299 F.3d 838, 855-56 (9th Cir. 2002) (en banc) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)), aff'd, 539 U.S. 90 (2003). To the extent we can evaluate this claim without a transcript, nothing in the record suggests that this case is atypical so as to make such an instruction appropriate. Nor do we have any record that Raad objected to the instructions at trial.

3. Costs are awarded to the prevailing party in civil actions as a matter of course, unless extraordinary circumstances make the award of costs improper. Fed. R. Civ. P. 54(d)(1); see also Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 591-93 (9th Cir. 2000) (en bane). Raad presents no extraordinary circumstances to merit a departure from the default rule.

4. The district court did not abuse its discretion in finding that Sparks recklessly engaged in unreasonable and vexatious litigation tactics, which unduly increased litigation costs for the opposing party. See 28 U.S.C. § 1927; see also Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001) ("[R]ecklessness suffices for § 1927 . . . ."). Nor did the district

court abuse its discretion as to the amount of sanctions. It imposed far less than the $55,000 in excess costs alleged.

5. A district court may award attorney's fees to a prevailing Title VII defendant if the plaintiff's "claim was frivolous, unreasonable, or groundless, or [it] the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co., v. EEOC, 434 U.S. 412, 422 (1978) (interpreting 42 U.S.C. § 2000e5(k)). We review for abuse of discretion. See Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998).

This was a long and costly suit. In total, the public school district incurred nearly $900,000 in attorney's fees. In awarding $150,000 in partial fees against Raad, the district court found that "[p]laintiff's claims were frivolous and totally lacking any foundation." In a different order, the district court did note that Raad presented one "legitimate jury issue"-namely, "that she was disciplined inordinately because of her race and/or religion after the incident in the superintendent's office." And, by previously reversing summary judgment on two of her claims, we held that Raad had made a prima facie case of discrimination and that genuine issues of fact existed. See Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1198 (9th Cir. 2003).

By ordering far less than the full amount of fees incurred by the school district in this

litigation, the district court obviously took into account the portions

plaintiff's case that were not frivolous. The district judge was intimately
familiar with the case and could thus properly apportion the fees incurred by the defendant in responding to the claims that were frivolous. The district court did not abuse its discretion in awarding partial attorney's fees: The award balances the excessive fees that the school district was forced to incur with Raad's ability to pay; it also strikes a reasonable compromise in not chilling plaintiffs from pursuing civil rights claims while still protecting employers and the public from shouldering the excess costs incurred when such plaintiffs continue to litigate claims after it's clear they lack merit.

DISMISSED in part and AFFIRMED in part

Raad v. Fairbanks North Star Borough School District, No. 04-35447, 04 35624, 04-35990

FILED
AUG 24 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JUDGE BERZON, dissenting in part:

I respectfully dissent from the portion of the memorandum disposition approving the $150,000 fees award against the plaintiff, Nada Raad.

The district court provided no adequate explanation as to why fees should be awarded against Raad, and no explanation at all concerning the amount of the fee award. Stringent standards apply to fee awards against plaintiffs in civil rights cases. *See Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421-22 (1978) (holding that a district court should award a prevailing defendant attorney's fees only if the plaintiffs action was "frivolous, unreasonable, or without foundation" and, even then, urging district courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation"). Stringent standards also apply regarding the extent to which a judge must explain how a fee award was calculated. *See Tutor-Saliba Corp. v. City of Hailey,* 452 F.3d 1055, 1065 (9th Cir. 2006) (explaining that the district court should "provide a concise but clear explanation of its reasons for the fee award" and that if it fails to

do so, the appellate panel "will remand the award for the court to

provide an explanation"); *Benton v. Or. Student Assistance Comm'n, 421* F.3d 901, 904 (9th Cir. 2005) ("[I]t is vital that the court provide `some indication or explanation of how [it] arrived at the amount of fees awarded.'") (quoting *Cummings v. Connell,* 402 F.3d 936, 947 (9th Cir. 2005) (alterations in original)). Given these standards, a fee award without an adequate justification cannot stand.

The district court at first stated that the award was being given because Raad's case was entirely frivolous - stating that there was "no rational basis for Plaintiff's allegations of discrimination" and that "Plaintiff's claims were frivolous and totally lacking any factual foundation." In a later order, the district court stated that fees were being awarded because "of the bad faith nature of Plaintiff's claims." Frivolousness and bad faith are entirely distinct rationales. Moreover, as the majority acknowledges, the district court, in yet a third order - but not one concerning the fee award against Raad - conceded that at least part of the case - the allegations concerning discriminatory discipline - was not frivolous and required jury determination. These three explanations simply cannot be reconciled. Furthermore, under the circumstances of this case, any justification would have to be extremely specific to be adequate. This court remanded for trial, reversing a motion for

summary judgment and finding that the plaintiff had made a

prima facie case of discrimination. There is substantial case law suggesting that a fee award for defendants is ordinarily improper in those circumstances. *See, e.g., Warren v. City of Carlsbad, 58* F.3d 439, 444 (9th Cir. 1995) (reversing the district court's conclusion that the plaintiff's case was "clearly frivolous" and the concomitant Rule 11 sanctions where the plaintiff had made a prima facie showing of Title VII disparate treatment and had raised additional facts potentially pointing to a discriminatory motive); *Mitchell v. Office ofL.A. County,* 805 F.2d 844, 847 (9th Cir. 1986) (reversing an attorney's fees award against a civil rights plaintiff where the plaintiff only brought suit after receiving a right-to-sue letter from the EEOC, thus indicating that there was "an adequate basis in law and facts" to pursue his claim); *Jensen v. Stangel, 762* F.2d 815, 818 (9th Cir. 1985) (indicating that earlier denials of a defendant's motions to dismiss and for summary judgment suggested that a plaintiffs claims "were not without merit").

To be sure, attorneys fees might be warranted even after a plaintiff survives summary judgment, if there is some unusual development at trial - for example, a failure by the plaintiff to present to the jury some key part of the evidence she had presented at summary judgment, so that there was less evidentiary support for her position at trial than on summary judgment, or a factual

presentation by the plaintiff that is refuted by devastating cross examination or irrefutable defense

evidence[1]. The district court, however, points to no such unusual circumstance here, and I am aware of none. The school board's motion, moreover, invited the district court to disregard the reversal of summary judgment by relying in part on the district court's original ruling granting summary judgment as a basis for awarding fees. As there was no explanation by the district court that takes account of the prior reversal of summary judgment in this case, I would reverse the fee award.

As to the amount of the award, all we know is that the defendants claimed to have incurred legal costs of more than $887,000, asked to be awarded $180,000, and were awarded $150,000. The majority suggests that by awarding an amount much lower than the total costs incurred by defendants and a bit lower than the amount actually requested, the district court was adjusting for the nonfrivolous portions of Raad's case. There is absolutely no basis for this conclusion. The fee orders

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[1] Even under those circumstance, however, courts have been reluctant to award fees to the prevailing defendant. *See, e.g., AFSCME v. County of Nassau,* 96 F.3d 644, 652 (2d Cir. 1996) (explaining that "a claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial" and that fees are unjustified "where evidence is introduced that, if credited, would suffice to support a judgment").

themselves refer to *overall,* not partial, frivolousness and bad faith. Also, even if one thought there was such an adjustment, there is no way to judge

whether the amount actually awarded bears any relationship to the hours expended, post-summary judgment, on any nonfrivolous cause of action; only post-summary judgment hours are pertinent, because summary judgment was reversed.

I would reverse the fee award outright as without justification. Absent that disposition, I would remand to the district court for an explanation both as to the reason for the award and as to the amount. I therefore respectfully dissent.

Appendix B

Not for publication

ORDER

Before KOZINSKI, BERZON and TALLMAN, Circuit Judges

NOT FOR PUBLICTAION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

FILED
SEP 28 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 04-35447
D.C. No. CV-97-00068-F-RRB

NADA RAAD,
Plaintiff-Appellant,
v.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee

No. 04-35624
D.C. No. CV-97-00068-F-RRB

NADA RAAD,
Plaintiff-Appellant,
v.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee

ORDER

Before: **KOZINSKI, BERZON** AND **TALLMAN**, CIRCUIT JUDGES

The petition for rehearing and rehearing en banc is **DENIED**. See Fed. R. App. P. 35; Fed. R. App. P. 40

Appendix C

ORDER

Before: TASHIMA and GOULD, Circuit Judges

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

FILED
OCT 19 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nos. 04-35447, 04-35624
District of Alaska, Fairbansk

NADA RAAD,
Plaintiff-Appellant,
V.
FAIRBANSK NORTH STAR
BOROUGH SCHOOL DISTRICT,
Defendant-Appellee

ORDER

Before: TASHIMA and GOULD, Circuit Judges

Appellant's September 1, 2004 motion for reconsideration of district court bond order is denied. *See* Fed. R. App. P. 7.

Appellant's September 16, 2004 motion for an extension of time to file the transcript designation or a Ninth Circuit Rule 10-3.1(f) certification is granted. On or before November 15, 2004, the appellant shall file at the district court either a transcript designation order for the transcripts identified by the appellee or a certification pursuant to Ninth Circuit Rule 10-3.1(f). If a transcript designation order is filed, the transcripts are due by December 15, 2004.

If the appellant does not wish the previously filed opening brief to be applied to both consolidated cases, the appellant may file a substitute consolidated 04-35447 openin[g] brief on or before February 14, 2005, and the previously filed brief will be stricken. In the absence of a substitute opening brief, the opening brief previously filed in appeal no. 04-35447 shall apply to both consolidated appeals. The consolidated answering brief is due on March 16, 2005, and the optional reply brief is due 14 days from service of the answering brief.

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